

(3) Where a general partner is a partnership, there shall be filed an audited balance sheet of such partnership as of the end of its most recently completed fiscal year.

(4) Where the general partner is a natural person, there shall be filed, as supplemental information, a balance sheet of such natural person as of a recent date. Such balance sheet need not be audited. The assets and liabilities should be carried at estimated fair market value, with provisions for estimated income taxes on unrealized gains. The net worth of such general partner(s), based on such balance sheet(s), singly or in the aggregate, shall be disclosed in the registration statement.

(g) *Age of Financial Statements.* At the date of filing, financial statements included in filings other than filings on Form 10-KSB must be not less current than financial statements which would be required in Forms 10-KSB and 10-QSB if such reports were required to be filed. If required financial statements are as of a date 135 days or more prior to the date a registration statement becomes effective or proxy material is expected to be mailed, the financial statements shall be updated to include financial statements for an interim period ending within 135 days of the effective or expected mailing date. Interim financial statements should be prepared and presented in accordance with paragraph (b) of this Item:

(1) When the anticipated effective or mailing date falls within 45 days after the end of the fiscal year, the filing may include financial statements only as current as the end of the third fiscal quarter; *Provided, however,* That if the audited financial statements for the recently completed fiscal year are available or become available prior to effectiveness or mailing, they must be included in the filing;

(2) If the effective date or anticipated mailing date falls after 45 days but within 90 days of the end of the small business issuer's fiscal year, the small business issuer is not required to provide the audited financial statements for such year end provided that the following conditions are met:

(i) If the small business issuer is a reporting company, all reports due must have been filed;

(ii) For the most recent fiscal year for which audited financial statements are not yet available, the small business issuer reasonably and in good faith expects to report income from continuing operations before taxes; and

(iii) For at least one of the two fiscal years immediately preceding the most recent fiscal year the small business issuer reported income from continuing operations before taxes.

[57 FR 36449, Aug. 13, 1992, as amended at 58 FR 26514, May 4, 1993; 61 FR 54515, Oct. 18, 1996; 62 FR 6064, Feb. 10, 1997; 64 FR 53909, Oct. 5, 1999; 64 FR 73401, Dec. 30, 1999; 65 FR 51710, Aug. 24, 2000]

**§ 228.401 (Item 401) Directors, Executive Officers, Promoters and Control Persons.**

(a) *Identify directors and executive officers.* (1) List the names and ages of all directors and executive officers and all persons nominated or chosen to become such;

(2) List the positions and offices that each such person held with the small business issuer;

(3) Give the person's term of office as a director and the period during which the person has served;

(4) Briefly describe the person's business experience during the past five years; and

(5) If a director, identify other directorships held in reporting companies naming each company.

(b) *Identify Significant Employees.* Give the information specified in paragraph (a) of this Item for each person who is not an executive officer but who is expected by the small business issuer to make a significant contribution to the business.

(c) *Family relationships.* Describe any family relationships among directors, executive officers, or persons nominated or chosen by the small business issuer to become directors or executive officers.

(d) *Involvement in certain legal proceedings.* Describe any of the following events that occurred during the past five years that are material to an evaluation of the ability or integrity of any director, person nominated to become a

director, executive officer, promoter or control person of the small business issuer:

(1) Any bankruptcy petition filed by or against any business of which such person was a general partner or executive officer either at the time of the bankruptcy or within two years prior to that time;

(2) Any conviction in a criminal proceeding or being subject to a pending criminal proceeding (excluding traffic violations and other minor offenses);

(3) Being subject to any order, judgment, or decree, not subsequently reversed, suspended or vacated, of any court of competent jurisdiction, permanently or temporarily enjoining, barring, suspending or otherwise limiting his involvement in any type of business, securities or banking activities; and

(4) Being found by a court of competent jurisdiction (in a civil action), the Commission or the Commodity Futures Trading Commission to have violated a federal or state securities or commodities law, and the judgment has not been reversed, suspended, or vacated.

(e) *Audit committee financial expert.*

(1)(i) Disclose that the small business issuer's board of directors has determined that the small business issuer either:

(A) Has at least one audit committee financial expert serving on its audit committee; or

(B) Does not have an audit committee financial expert serving on its audit committee.

(ii) If the small business issuer provides the disclosure required by paragraph (e)(1)(i)(A) of this Item, it must disclose the name of the audit committee financial expert and whether that person is *independent*, as that term is used in Item 7(d)(3)(iv) of Schedule 14A (240.14a-101 of this chapter) under the Exchange Act.

(iii) If the small business issuer provides the disclosure required by paragraph (e)(1)(i)(B) of this Item, it must explain why it does not have an audit committee financial expert.

*Instruction to paragraph (e)(1) of Item 401.* If the small business issuer's board of directors has determined that the small business issuer has more than one audit committee fi-

ancial expert serving on its audit committee, the small business issuer may, but is not required to, disclose the names of those additional persons. A small business issuer choosing to identify such persons must indicate whether they are independent pursuant to Item 401(e)(1)(ii).

(2) For purposes of this Item, an *audit committee financial expert* means a person who has the following attributes:

(i) An understanding of generally accepted accounting principles and financial statements;

(ii) The ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;

(iii) Experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the small business issuer's financial statements, or experience actively supervising one or more persons engaged in such activities;

(iv) An understanding of internal controls and procedures for financial reporting; and

(v) An understanding of audit committee functions.

(3) A person shall have acquired such attributes through:

(i) Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;

(ii) Experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor or person performing similar functions;

(iii) Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or

(iv) Other relevant experience.

(4) *Safe Harbor.* (i) A person who is determined to be an audit committee financial expert will not be deemed an *expert* for any purpose, including without limitation for purposes of section 11 of the Securities Act of 1933 (15

U.S.C. 77k), as a result of being designated or identified as an audit committee financial expert pursuant to this Item 401.

(ii) The designation or identification of a person as an audit committee financial expert pursuant to this Item 401 does not impose on such person any duties, obligations or liability that are greater than the duties, obligations and liability imposed on such person as a member of the audit committee and board of directors in the absence of such designation or identification.

(iii) The designation or identification of a person as an audit committee financial expert pursuant to this Item 401 does not affect the duties, obligations or liability of any other member of the audit committee or board of directors.

*Instructions to Item 401(e).* 1. The disclosure under Item 401(e) is required only in a small business issuer's annual report. The small business issuer need not provide the disclosure required by this Item 401(e) in a proxy or information statement unless that small business issuer is electing to incorporate this information by reference from the proxy or information statement into its annual report pursuant to general instruction E(3) to Form 10-KSB.

2. If a person qualifies as an audit committee financial expert by means of having held a position described in paragraph (e)(3)(iv) of this Item, the small business issuer shall provide a brief listing of that person's relevant experience. Such disclosure may be made by reference to disclosures required under paragraph (a)(4) of this Item 401 (§ 229.401(a)(4) or this chapter).

3. In the case of a foreign private issuer with a two-tier board of directors, for purposes of this Item 401(e), the term *board of directors* means the supervisory or non-management board. Also, in the case of a foreign private issuer, the term *generally accepted accounting principles* in paragraph (e)(2)(i) of this Item means the body of generally accepted accounting principles used by that issuer in its primary financial statements filed with the Commission.

4. A small business issuer that is an Asset-Backed Issuer (as defined in § 240.13a-14(g) and § 240.15d-14(g) of this chapter) is not required to disclose the information required by this Item 401(e).

5. Following the effective date of the first registration statement filed under the Securities Act (15 U.S.C. 77a *et seq.*) or Securities Exchange Act (15 U.S.C. 78a *et seq.*) by a small business issuer, the small business issuer or successor issuer need not make the disclosures required by this Item in its first

annual report filed pursuant to Section 13(a) or 15(d) (15 U.S.C. 78m(a) or 78o(d)) of the Exchange Act after effectiveness.

[57 FR 36449, Aug. 13, 1992, as amended at 68 FR 5125, Jan. 31, 2003; 68 FR 15353, Mar. 31, 2003]

#### § 228.402 (Item 402) Executive compensation.

(a) *General*—(1) *All compensation covered.* This item requires clear, concise and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to the named executive officers designated under paragraph (a)(2) of this item, and directors covered by paragraph (f) of this item by any person for all services rendered in all capacities to the registrant and its subsidiaries, unless otherwise specified in this item. Except as provided by paragraph (a)(4) of this item, all such compensation shall be reported pursuant to this item even if also called for by another requirement, including transactions between the registrant and a third party where the primary purpose of the transaction is to furnish compensation to any such named executive officer or director. No item reported as compensation for one fiscal year need be reported as compensation for a subsequent fiscal year.

(2) *Persons covered.* Disclosure shall be provided pursuant to this item for each of the following (the "named executive officers"):

(i) All individuals serving as the registrant's chief executive officer or acting in a similar capacity during the last completed fiscal year ("CEO"), regardless of compensation level;

(ii) The registrant's four most highly compensated executive officers other than the CEO who were serving as executive officers at the end of the last completed fiscal year; and

(iii) Up to two additional individuals for whom disclosure would have been provided pursuant to paragraph (a)(2)(ii) of this item but for the fact that the individual was not serving as an executive officer of the registrant at the end of the last completed fiscal year.

*Instructions to Item 402(a)(2):* 1. *Determination of Most Highly Compensated Executive Officers.* The determination as to which executive officers are most highly compensated shall be